No. 11,107

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN FANNON,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

The appellant, John Fannon, was indicted on the 23rd day of March, 1945, by a Grand Jury of the District Court of the Third Division of the Territory of Alaska, on a charge of knowingly failing and neglecting to perform a duty required of him under the provisions of the "Selective Training and Service Act of 1940, as amended" and the rules and regulations made and directions given thereunder. The regulation which the defendant and appellant was charged with having violated was section 633.21 of the Selective Service Regulations, which is as follows:

"633.21 DUTY OF REGISTRANT TO REPORT FOR AND SUBMIT TO INDUCTION. (a) When the local board

mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board."

To the indictment, defendant pleaded not guilty, was found guilty by a jury on the 10th day of April, 1945,

and within the time allowed by law, perfected his appeal from the judgment of the said District Court rendered on the 27th day of June, 1945, wherein and whereby appellant was sentenced to be imprisoned in the Federal Jail at Anchorage, Alaska, for the term of one year and to pay a fine of $2,000.00.

This Court has jurisdiction to entertain the appeal by virtue of the provisions of the Act of Congress of May 31, 1935, 49 Statutes-at-Large 313, which is as follows:

> "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions. * * *
>
> Third, In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all civil cases wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all criminal cases, and in all habeas corpus proceedings; * * *"

STATEMENT OF THE CASE.

In compliance with the Selective Service Act, the appellant registered with the Local Board No. One of Kelso, Washington, on October 16, 1940. Thereafter on April 16, 1941, he was classified "4-F".

Thereafter, after sundry reclassifications, on June 29, 1944, the appellant was reclassified to "1-A", and on July 25, 1944, was transferred to the Anchorage

Local Board No. One at Anchorage, Alaska, for pre-induction physical examination.

On August 11, 1944, appellant was directed by the Anchorage Board to report on August 23, 1944, for preinduction physical examination, and pursuant to such direction, on August 25, 1944, was given his pre-induction physical examination, was found "physically fit, acceptable for general military service." Transcript of Record, Page 88.

On September 26, 1944, an order was mailed to the appellant from the local board of Kelso, Washington, directing him to report for induction at the office of that board on October 12, 1944. Pursuant to instructions contained in said order to report for induction, appellant presented himself at the Local Board of Anchorage, Alaska, and made a written request for transfer for delivery for induction, which was approved. Plaintiff's Exhibit No. 6, T.R. 92.

Thereafter, on October 18, 1944, an order to report for induction was mailed to appellant by the Anchorage Local Board, and received by him on October 19, 1944. Plaintiff's Exhibit No. 7, T.R. 54-55.

By the terms of this last mentioned order, the appellant was directed to report to the said Anchorage Local Board No. One at Room 128, Federal Building, Anchorage, Alaska, at 8:00 A.M. on the 30th day of October, 1944. T.R. 54.

On the said 30th day of October, 1944, the Anchorage Local Board reported to the United States Attorney, Noel K. Wennblom, at Anchorage, Alaska, that

appellant failed to report for induction pursuant to said order to report for induction. Plaintiff's Exhibit No. 8, T.R. 57-58.

This report was signed by one Louise Annabel, a clerk for Local Board No. One, Anchorage, Alaska, and a witness for the government.

The evidence of the government offered and admitted as proof that appellant did fail to report for induction as required by the order of October 18, 1944, was testimony of this witness Louise Annabel, and was as follows:

> "The file handed me I have identified as the file of Local Board No. One of Anchorage, Alaska, for registrant John Fannon. The file reflects that in respect to that order to report for induction he failed to report for induction on the 30th day of October, 1944." T.R. 55.

The indictment charges:

> "the said John Fannon did then and there wilfully, feloniously, knowingly and unlawfully fail and neglect to report at Fort Richardson, Alaska, for induction, as he was required to do by said order, * * *" T.R. 3.

The said order states:

> "You will therefore, report to the local board named above at Room 128 Federal Building, Anchorage, Alaska, at 8:00 A.M. on the 30th day of October, 1944. This local board will furnish transportation to an induction station." T.R. 54.

Sometime previously the appellant had notified the draft board in writing to direct his mail in care of his

attorney, Karl Drager, Box 484, Anchorage, Alaska. T.R. 39.

The order to report for induction was mailed to appellant on October 18, 1944, addressed to him in care of Karl Drager, Box 484, Anchorage, Alaska. Plaintiff's Exhibit No. 8, T.R. 57.

In the said last exhibit mentioned is the following recital:

> "3. Efforts to locate the delinquent:
> The delinquent has been located by Louise Annabel, Anchorage, Alaska, a clerk, Local Board 1, on 30 October, at Palmer, Alaska."

SPECIFICATIONS OF ERROR.

The appellant relies upon the following Assignments of Error:

1. Assignment of Error II, T.R. 105-106.
2. Assignment of Error III, T.R. 106-107-108.
3. Assignment of Error IV, T.R. 108-109.
4. Assignment of Error VI, T.R. 110-111.
5. Assignment of Error VIII, T.R. 112.
6. Assignment of Error IX, T.R. 112.

ARGUMENT.

ARGUMENT ON ASSIGNMENT OF ERROR III.

The assignment of error to which this argument is addressed is as follows:

> "That the court erred in the admission of certain testimony of the witness Ruth V. Ander-

son, a witness called by the government, as follows:

The Witness. Referring to form D.S.S., dated June 14th, 1943, that is an official form of the department, Selective Service Form 281. This was the form that was mailed to the registrant. (Witness reads paper) as follows: 'June 14, 1943, to John Fannon, Order No. 2253, addressed to Lansing Hotel, Tacoma, Washington. The printed form is as follows: Dear Sir: According to information in possession of this local board, you have failed to perform the duty or duties imposed upon you under the selective service law as specified below'——

Mr. Drager. I object on the ground that it is irrelevant and immaterial. It is too remote.

Mr. Plummer. You have availed yourself of letters dating back to August and September of 1943. I think the relevancy of this form is no more remote than those letters read in the previous examination by Mr. Drager.

Mr. Drager. I would like to know the purpose of it. I have a purpose in referring to the others. I can't see the purpose of this except to prejudice.

Mr. Plummer. May I state the purpose?

The Court. Yes.

Mr. Plummer. My purpose in having that read is that there are several other such forms in the file here, and it is my contention that the present charge is one of a series of events which are a part of a general scheme to evade the selective service law.

The Court. I am not sure of that and the defendant hasn't been indicted for that; however the subject has already been opened up by part of an exhibit that was read at the instance of

counsel for the defendant in which he referred to embarrassment he suffered by reason of failure to receive notice to report for induction and some legal action. This is part of the same subject and the subject is already before the jury. I shall admit it. Objection overruled and exception allowed. You may admit it.

A. Commencing where I left off, the Notice of Delinquency. 'Failure to report for induction. You are therefore directed to report by mail, telegraph, or in person, at your own expense to this local board, on or before 9:00 P.M., on the 19th day of June, 1943. Failure to report on or before the day and hour mentioned is an offense punishable by fine or imprisonment or both.'

Q. Will you turn to D.S.S. Form 281 dated April 10, 1943, and read that to the court and jury, please.

Mr. Drager. Same objection.

The Court. Same ruling. Objection overruled and exception allowed.

A. 'Notice of delinquency. April 10, 1943, to John Fannon, Order No. 2253, Lansing Hotel, Tacoma, Washington. The same form. Dear Sir: According to information in possession of this local board, you have failed to perform the duty or duties, imposed upon you under the selective service law as specifiied below. Failure to report for physical examination. You are therefore directed to report by mail, telegraph, or in person, at your own expense to this local board, on or before 5:00 P.M. on the 15th day of April, 1943. Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both. Clerk of Local Board' ". T.R. 106-107-108.

The admission of this evidence was prejudicial error. A well known exception to the rule against the admission of proof of similar offenses is that such evidence is sometimes admissable to show a general scheme to violate the law in the respect charged in the indictment. That was the ground urged in the present instance by the United States Attorney. We again quote his statement as follows:

> "My purpose in having that read is that there are several other such forms in the file here, and it is my contention that the present charge is one of a series of events which are a part of a general scheme to evade the selective service law." T.R. 107.

However, the court did not admit this evidence on that ground or for the purpose indicated, but on the ground that the defendant's attorney had opened up the subject by having a letter written by the defendant read in evidence, which was already part of an exhibit offered and admitted in evidence at the instance of the United States Attorney. The above quoted remarks of the United States Attorney were extremely prejudicial; the defendant was held up to the jury as a consistent and persistent draft evader. The impression necessarily received by the jury must have been highly prejudicial to the defendant.

The fact that subsequently, on recross examination, testimony of Ruth V. Anderson, a witness for the government, revealed that the delinquencies had been cleared up, could not have removed the prejudicial impression thus created. T.R. 50.

The court should not only have sustained the objection to the evidence admitted, but should have emphatically rebuked the United States Attorney and admonished the jury to disregard his remarks, though it is doubtful that even such action could have cured the error and removed the prejudicial impression necessarily received by the jury.

ARGUMENT ON ASSIGNMENT OF ERROR IV.

The assignment of error to which this argument is addressed is as follows:

> "That the court erred in refusing to instruct the jury as requested by the defendant as follows, which was requested by the defendant before the jury was instructed, and to which ruling the defendant excepted and the exception was allowed.
>
> 'A criminal intent, as explained in these instructions is always necessary to constitute a crime, and when such criminal intention does not appear, from all the facts and circumstances proved on the trial, then the act complained of cannot be deemed a crime. Misadventure or accident, when the circumstances rebut the presumption of criminal intention and of criminal negligence, as explained in these instructions, are not deemed, in law, criminal, however injuriously they may affect persons or property. And, in this case, the matter of intent is an essential element of the offense charged, which the government must prove to the satisfaction of the jury beyond a reasonable doubt, and if the evidence fails to establish, beyond a reasonable doubt, that the defendant was able to

report for induction and failed and neglected to do so, with the intent to wilfully evade or avoid induction, it will be the duty of the jury to acquit the defendant.

'In considering the matter of intent, it is competent for the jury to consider all of the facts in connection therewith, including the physical ability of the defendant to report or not to report, his effort or lack of effort to inform his Draft Board of his whereabouts, and having considered all of these things, to authorize a conviction, the facts and circumstances must not only all be in harmony with the guilt of the accused, but they must be of such character as to be inconsistent with his innocence and consistent with a wilfull intent.' '' T.R. 108-109.

We strongly urge that under the circumstances of the case, the defendant was clearly entitled to the instruction requested.

ARGUMENT ON ASSIGNMENT OF ERROR VI.

The assignment of error to which this argument is addressed is as follows:

"That the court erred in giving the jury the following instruction:

'I instruct you that the essential elements which the government must prove of the charge charged in the indictment are:

First: That the said violation occurred within the jurisdiction of this court;

> Second: That said violation occurred on or about the 30th day of October, 1944, or within three years before the finding of the indictment. * * *
>
> On the ground that the indictment charged the defendant with having failed to report on October 30th, 1944, not before or after that date, on the ground that time became and was an essential ingredient of the offense, and on the ground that evidence was admitted in the case of other delinquencies of the defendant under the theory that they showed a general scheme of evasion of the law, and that said instruction was misleading to the jury and might have influenced them to convict the defendant for offenses for which he was not on trial.' " T.R. 110-111.

The objectionable part of the above instruction is that contained in Paragraph Second of said instruction, T. R. 111, which is as follows:

> "Second. That said violation occurred on or about the 30th day of October, 1944, or within three years before the finding of the indictment. * * *"

It is true that no exception was taken to the instruction complained of, and that therefore, ordinarily no error could be assigned thereon. This consideration will be treated hereinafter in discussing another assignment of error.

It must be conceded that in this case that time was an essential ingredient of the offense. The defendant was ordered to report for induction on a certain date

and was indicted for failure to report on that date. Reporting on some other date than that on which he was required to report, could not have been considered as a compliance with the order, nor could a failure to report on some other date have been considered a violation of the order, nor could a violation of some other order of induction requiring defendant to report on some other date sustain the charge in the indictment.

In this case, evidence was admitted of similar delinquencies of the defendant committed within three years prior to the finding of the indictment. The jury was told by the United States Attorney that the defendant had pursued a general scheme to evade the selective service law and the jury may very well have regarded the instruction complained of as authorizing them to convict the defendant of some other offense than that charged in the indictment.

ARGUMENT ON ASSIGNMENTS OF ERRORS VIII AND IX.

The assignments of errors to which this argument is addressed, are as follows:

> "That the court erred and abused his discretion in overruling defendant's amended motion for a new trial, filed May 1st, 1945, to which ruling defendant excepted and the exception was allowed." T. R. 112.
>
> "That the court erred and abused his discretion in overruling defendant's motion for a new trial,

filed June 8th, 1945, to which ruling defendant excepted and which exception was allowed." T. R. 112.

The motions for a new trial based upon the ground of newly discovered evidence are set forth on pages T. R. 75-80.

Although when the government rested its case it was clear from the evidence that the defendant Fannon was lying ill in the hospital at Palmer, Alaska, on October 30, 1944, and that such fact was known to Anchorage Local Draft Board No. One, as appears from their records, admitted in evidence, plaintiff's Exhibit No. 8, T. R. 57, and from the testimony of Louise Annabel with regard thereto, T. R. 57-58-59-60, nevertheless the jury convicted the defendant of intentional and wilful violation of the Selective Service Act of 1940, as amended.

Subsequent to the verdict and within the time allowed by law, the defendant filed his aforesaid motions for new trial based upon the ground of newly discovered evidence. In these motions, particularly in the second motion under date of May 28, 1945, the defendant sets forth by affidavit the circumstances in detail accounting for his being at the hospital in Palmer, Alaska, on the 30th day of October, 1944, the day on which he was under orders to report for induction. In his affidavit in support of said motion, the defendant recites many facts known to him at the time of trial, but also other facts not known to him at the time of trial, which in substance show

that the authorities at Fort Richardson, Alaska, were in communication with the defendant's physician at Palmer, Alaska, on the said 30th day of October, 1944; that the defendant's physician was instructed by an Army Medical Officer at Fort Richardson to continue his treatment of affiant at the Palmer Hospital and not to cause the transfer of affiant to the Fort Richardson military reservation. Also said physician was informed by the said Medical Officer that it was not necessary for the affiant to report for induction on the day set therefor, to-wit, October 30, 1944, nor for ninety days thereafter.

The defendant also states in his affidavit in support of said motion, facts indicating that the Army Medical Officer referred to was one Captain Sidney Leschner, and that the said Captain Leschner was the Induction Officer at Fort Richardson, Alaska at said time.

The defendant did not take the stand, presumably following the advice of his attorney, who died prior to the date of the second motion for a new trial. His attorney evidently was of the opinion that there were sufficient facts in evidence to warrant an acquittal. Be that as it may, the defendant took upon himself the burden of proving his innocence and asked for a new trial in order to have an opportunity so to do. We contend that under the circumstances it was the duty of the Court to have afforded the defendant that opportunity by granting his motion for a new trial and that his failure so to do was an abuse of judicial discretion.

ARGUMENT ON ASSIGNMENT OF ERROR II.

The assignment of error to which this argument is addressed is as follows:

> "That the court erred in submitting the case to the jury, for the reason that there was not sufficient evidence submitted to the jury to sustain a conviction, and no evidence whatever that the defendant did wilfully fail to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, as charged in the indictment." (T.R. 105-106.)

It is clearly in evidence as heretofore many times stated, that on the 30th day of October, 1944, the day on which the defendant was under orders to report for induction, the defendant was ill in the hospital at Palmer, Alaska. That fact is shown by the testimony of the government witness, Louise Annabel, a clerk of the Anchorage Local Draft Board No. One. (Tr. 58, 59-60.) She testified as follows:

> "That is all that is filled in by this office. It is signed by me. As a matter of fact, this is a copy. My signature is on there, but it is a copy. The original went to the District Attorney's office. It is addressed to Mr. Wennblom, United States Attorney, and this is a copy we hold in our files. It states, referring to the section numbered '3' at the bottom of the first page, that the delinquent has been located at Palmer, Alaska. The paragraph I read on the reverse side states that the following persons may know the whereabouts of the delinquent. Listed under that paragraph is Oscar Olson, United States Deputy Marshal. The date on which he was to have reported was on

the 30th day of October at 8:00 o'clock A.M. The date of this (plaintiff's Exhibit No. 8) is October 30, 1944. I remember having a phone call from you (Mr. Drager) in reference to Mr. Fannon's failure to report. I remember that at the time you called and reported to me that he was in the hospital at Palmer, that I replied to you that we already knew that. I made a report of this delinquent to the Kelso board. The regulations provide that we Local Board No. 1 of Anchorage make the report of delinquency to the district attorney. This DSS Form 550 I have just read is the report we made. My understanding is that immediately this report goes to the district attorney, we then lose jurisdiction of the registrant, that the matter is in the hands of the district attorney, and is out of our hands. There is no recommendation as to procedure from our office, as to what should be done, to the district attorney's office. We knew that Mr. Fannon was in the hospital at Palmer from communicating with the hospital at Palmer and they verified it. *The doctor said he was ill, that there was something the matter with him, but as yet he hadn't determined what the trouble was.* He hadn't operated at that time on the defendant here. I talked to the doctor personally. I did not have any communication with a colonel of the Medical Corps at the Fort in connection with Mr. Fannon about that time in connection with his illness or his failure to report. I talked to I believe it was a Captain Leshner. He is a medical officer. There was a conversation on the subject of his (Fannon's) being ill and in the hospital. The information came from me. I do not know if he made any investigation at all."

And on redirect examination, the witness further testified:

"By Mr. Plummer:

(File handed to the witness.)

Witness continuing: I have before me what purports to be a memorandum of a telephone conversation which I had with doctor—Captain Leshner on October 30, 1944. Captain Leshner told me that inasmuch as the registrant John Fannon was an inductee, he could be removed or rather he would be accepted at Fort Richardson and held there under observation for the determining of his condition."

And on recross examination:

"By Mr. Badger (Drager): I did not communicate that information to Mr. Fannon or to any of his representatives." (T.R. 58-59-60.)

In this connection, Ruth V. Anderson, a witness for the government and an assistant clerk of the Draft Board No. One of Kelso, Washington, testified as follows:

"Generally a man is reported to the district attorney immediately when he fails to report for induction. The regulations say promptly. The regulations use the word promptly. That is under section 642.21. The board has discretion in the matter within a reasonable extent. However regulations state he should be reported promptly on failure to report. He is considered delinquent when he fails to report immediately. But it is

still in the board's hands until it is reported to the district attorney." (T.R. 42.)

In alluding to Section 642.21, the witness evidently referred to Section 642.41 of the Selective Service Regulations, which is as follows:

"642.41. Report of Delinquent to the United States Attorney. (a) Every registrant who has heretofore or who hereafter fails to comply with an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (Form 550); provided that if the local board believes that by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (Form 550) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (Form 550) shall be placed in the delinquent's Cover Sheet (Form 53).

(b) In endeavoring to locate and to secure the compliance of a delinquent prior to reporting him to the United States Attorney, the local board should contact the delinquent and the 'employer' or 'person who will always know' the delinquent's address, as shown on the Registration Card (Form 1), or any other person likely to know his whereabouts. The local board may enlist the aid of local and State police officials or any other public or private agencies it deems advisable. In no event, however, will the local board order or participate in a delinquent's arrest. * * *"

There is no question but what the Anchorage Local Board reported the delinquency "promptly". The delinquency was reported on October 30, 1944, the same day on which defendant failed to report. No time was lost; no effort was made to locate the registrant. He was already located; he was at Palmer, Alaska, a few miles from Anchorage, Alaska. It is so stated in the Report of Delinquency. He was known to be ill in the hospital.

There was no testimony offered or introduced tending to show that the defendant was purposely in the hospital or was purposely pretending to be sick in order to evade the draft. No such inference could be legitimately drawn from the evidence. The fact that the date on which the defendant was ill and in the hospital coincided with the date he was due to report for induction could not afford such an inference. It was a coincidence which could not overcome the presumption of innocence. On the evidence before the jury the defendant was unable to report. The prosecution had abundant opportunity to investigate the matter and ascertain all facts which might indicate that the defendant was a malingerer.

On November 1, 1944, Mr. Karl Drager, the defendant's attorney, in whose care the draft board was instructed to send his mail, wrote a letter to Local Board No. One, Kelso, Washington, as follows:

"Gentlemen:

On behalf of John Fannon who was ordered to report to the Local Board, Anchorage, October 30, for induction, you are informed that Mr. Fan-

non has been under the doctor's care and on or about October 28, 1944 was hospitalized at the Palmer Hospital at Palmer, Alaska for a major operation. At the present time he is in the hospital convalescing from the operation. This information was given to the Local Board, Anchorage, but at the request of Mr. Fannon, I am forwarding it to you also. This communication is not for the purpose of change of address as no change of address is necessary. Palmer, Alaska, is adjacent to Anchorage, Alaska, and proper provisions have been made for forwarding and contacting.

Very truly yours,
John Fannon,
By Karl A. Drager, Attorney."

(T.R. 37-38.)

There is another and more cogent reason to support our contention that there was insufficient evidence to warrant a conviction, and that the Court should have directed a verdict of not guilty.

The charging part of the indictment states as follows:

"Said John Fannon * * * did wilfully, knowingly, feloniously and unlawfully fail and neglect to perform a duty required of him under and in the execution of said Act and the rules and regulations made pursuant thereto, in that, * * * and having been theretofore duly ordered and notified by said Local Board Number One, at said Anchorage, to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, pursuant to the powers conferred upon such

> Board by the 'Selective Training and Service Act of 1940, as amended' and the rules and regulations duly made pursuant thereto, the said John Fannon did then and there wilfully, feloniously, knowingly and unlawfully fail and neglect to report at Fort Richardson, Alaska, for induction, as he was required to do by said order, * * * " (T.R. 2-3).

It will be noted that the indictment recites that the defendant was ordered and notified to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, and that he failed and neglected to report for induction at Fort Richardson, Alaska, as required to do by said order.

The defendant was not by any order in writing, or otherwise, ever ordered to report for induction at Fort Richardson. By the order referred to in the indictment, under date of October 18, 1944, the defendant was directed and ordered as follows:

> "You will therefore report to the Local Board named above at Room 128 Federal Building, Anchorage, Alaska, at 8:00 o'clock A.M. on the 30th day of October, 1944." (T.R. 54.)

The defendant was further informed that the Local Board would furnish transportation to an induction station. He was further informed as follows:

> "If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for

transfer of your delivery for induction, taking this order with you." (T.R. 55.)

Fort Richardson, Alaska is not mentioned in the Order to Report for Induction referred to in the indictment. A reporting at Fort Richardson by the defendant would not have been a compliance with the Order of Induction. The defendant has been tried and convicted of failing to perform a duty, the performance of which would not devolve upon him until ordered to perform it. The duty which he was ordered to perform as defined in section 633.21 of the Selective Service Regulations is as follows:

> "DUTY OF REGISTRANT TO REPORT FOR AND SUBMIT TO INDUCTION. (a) When the local board mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in said order. * * *
>
> (b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where the induction will be accomplished. * * * "

There is not a scintilla of evidence that the defendant was ever ordered or notified by Anchorage Local Board No. One to report for induction at Fort Richardson, Alaska, on the 30th day of October 1944, or on any other day.

It is true that at the close of the government's case no motion was made by the defendant or his attorney

that the Court direct the jury to return a verdict of not guilty on the ground of insufficiency of the evidence to support a verdict of guilty. Nor was such a motion made when both sides had rested. Likewise, in regard to another Specification of Error heretofore argued, no objection, no exception was taken by the defendant or his attorney, and we concede that ordinarily this Court would not take cognizance of assigned errors not predicated upon proper objections and exceptions. We cannot, of course, account for the failure of defendant's counsel to protect the record, but we can only ask the Court to follow the rule laid down in *Van Gorder v. United States,* 21 Fed. (2d) page 942, paragraph 6:

> "Counsel for the United States object to the consideration or action of this Court in this case under this writ of error, because, while in the course of the trial the defendant's counsel recorded many objections to rulings of the Court, he recorded no exceptions and made no motion or request that the Court direct the jury to return a verdict in the defendants' favor. But, since the decision of the Supreme Court in *Wiborg v. U.S.,* 163 U.S. 632, 659, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, there has been and still exists an alleviation in the interests of justice of the strict rule and practice that no relief whatever may be granted by the federal appellate Courts, except on recorded objections or exceptions to rulings in the trial Courts, to the effect that in criminal cases involving the life or liberty of the accused the appellate Courts of the United States may notice and correct, in the interest of

a just and fair enforcement of the law, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions, or assignments of error. *Crawford v. U.S.*, 212 U.S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Weems v. U.S.*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; *August v. U.S.* (CCA.) 257 F. 388, 392; *McNutt v. U.S.* (C.C.A.) 267 F. 670, 672; *Lamento v. U.S.* (CCA.) 4 F. (2d) 901, 904, and cases cited. This is a criminal case, the liberty of the defendant below for five years of his life, less good time he might earn, is at stake; if he is innocent of the crime charged against him, an irreparable injury will be inflicted upon him by the affirmance of the judgment before us. After a careful scrutiny of all the evidence and the proceedings in the trial of this case, we cannot divest our minds of the conclusion that there was not sufficient evidence of the guilt of the accused at his trial to sustain the verdict of his conviction under the established rules of law to which reference has been made.

The judgment is accordingly reversed, and the case remanded to the court below for further proceedings."

The same reasons which impelled the Court to depart from the strict rules of practice in the case in which the opinion above quoted was rendered, apply with equal or perhaps more force in the instant case.

In the *Van Gorder* case the offense was larceny. The defendant was convicted of larceny and con-

fronted with a five year sentence. In the instant case the defendant was convicted of what is unpopularly known as draft dodging. He was tried in a war zone, in war time, in a territory that had been invaded, at a place adjacent to Fort Richardson populated with thousands of soldiers, at a place where the people were necessarily war conscious.

Under these circumstances it was the duty of the trial Court to exercise the utmost care to at all times protect the defendant from any appeal to the passion and prejudice of the jury; to guard against a verdict "on general principles"; against the admission of prejudicial testimony, such as evidence of other delinquencies and the remarks of the district attorney in support of its admission.

It was moreover the duty of the Court in its instructions to carefully restrict the jury to consideration of the crime charged in the indictment and no other, that is, a failure to report for induction on October 30, 1944 pursuant to an order to report on that day, instead of which the jury was told that the government must prove "that said violation occurred on or about the 30th day of October, 1944, *or within three years before the finding of the indictment,*" thus almost inviting the jury to consider delinquencies of the defendant occurring long prior to the date of the offense charged, notwithstanding such delinquencies had been "cleared up." (T.R. 50.)

Sec. 633.21 of the Selective Service Regulations provides as follows:

"Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

The witness Louise Annabel, called by the government, on direct examination testified as follows:

"Q. Will you refer to the file of Selective Service Board No. 1. Local Board No. 1 of Anchorage, Alaska, and by referring to your file are you able to state whether or not the defendant, Mr. Fannon, ever made application or request for postponement of induction in connection with this Order to Report for Induction on the 30th day of October, 1944? A. No, sir.

Witness continuing: Referring to our files of Local Draft Board No. 1 of Anchorage, Alaska, no one else ever made application or request for postponement of Mr. Fannon's induction, a request in his behalf in regard to the Order to Report for Induction on October 30, 1944. Again referring to the file, I can state that the induction of John Fannon was never postponed by Local Draft Board No. 1 of Anchorage, Alaska. Mr. Fannon has not, to my knowledge, contacted Local Draft Board No. 1 at Anchorage, Alaska, at any time since October 30, 1944." (T.R. 56.)

The purpose of this testimony is evidently to prove delinquencies subsequent to the 30th of October, 1944. What other purpose could there be?

The indictment was found March 23, 1945. So evidence is offered to prove continual delinquency of the defendant from October 30, 1944, to March 23, 1945, notwithstanding that the witness further testified that after the delinquency is reported to the district attorney the board loses jurisdiction of the registrant. (T.R. 59.) And the government witness, Ruth V. Anderson also testified:

> "It is out of the hands of the local board after the form is mailed to the district attorney." (T.R. 56-59.)

As to the testimony of Louise Annabel (T.R. 56) to the effect that that defendant had never made application for postponement of induction in connection with the Order to Report for Induction on the 30th day of October, 1944, we refer to the letter of the Cowlitz County Local Board under date of August 1, 1944:

> "1 August, 1944
>
> John Fannon
> c/o Karl Drager
> Anchorage, Alaska
> re: Order No. 2253
>
> Dear Sir:
>
> We have your letter of 25 July, 1944 requesting postponement of induction and we wish to advise that following your preinduction physical examination and before you are ordered to report for active duty, local board will give considera-

tion to your request and will advise you at that time.

Yours truly,
Cowlitz County Local Board,
Walter J. Vitous,
Chairman

AB:ra By ————————
Clerk"

The foregoing was in response to a letter written by the defendant under date of July 25, 1944 (T.R. 49) as follows:

"July 25, 1944

Dear Sirs: I have just received a card from you putting me in 1-A. I would like to know if I can have enough time before induction to harvest our potato crop and cultivate. We have in 9 acres of potatoes, my partner is an old man and not capable of doing this and help is nearly impossible to obtain. It would work quite a hardship on my wife and child if the crop was a loss as she isn't hardly able to work and take care of a small child. Thanking you I remain, John Fannon, care of Karl Drager." (T. R. 49.)

The witness Ruth V. Anderson testified that the foregoing letter was not considered a deferment request. (T. R. 49.) Yet the Board did so consider it and assured the defendant that it would be considered and he would be advised *in time.* Yet the Anchorage Local Board did not so advise him. They knew his whereabouts, that he was ill in the hospital in Palmer; they made no effort to contact him as required by law

to do, but with all possible expedition reported him delinquent to the district attorney's office.

The conduct of the prosecution from start to finish indicates hostility and unfairness toward the defendant.

CONCLUSION.

The judgment rendered in this case should be set aside because of:

First. The admission of proof of similar offenses, before and after the date charged, and remarks of the district attorney in connection therewith prejudicial to the defendant.

Second. Instruction of the Court that the crime charged could have been committed within three years prior to the finding of the indictment.

Third. Refusal of the Court to instruct the jury as requested by the defendant on the subject of criminal intent.

Fourth. Abuse of discretion in overruling defendant's motion for a new trial based upon newly discovered evidence.

Fifth. Insufficiency of the evidence to justify the verdict, in that:

a. The evidence clearly showed that the defendant was ill in the hospital at Palmer, Alaska, on the date of the alleged offense and could not possibly have complied with the Order of Induction.

b. And finally and principally because,

The indictment charges the defendant with failure to perform a duty required by the Selective Service Act of 1940, as amended, and rules and regulations duly made pursuant thereto, in that having been ordered and notified by Anchorage Local Board No. One to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, he wilfully, feloniously, knowingly and unlawfully failed and neglected to report at Fort Richardson, Alaska, for induction.

Whereas the evidence of the government showed that the defendant had never been ordered to report at Fort Richardson, Alaska for induction, inferentially or otherwise.

Dated, Anchorage, Alaska,
February 18, 1946.

Respectfully submitted,
GEORGE B. GRIGSBY,
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E. COKE HILL,
Of Counsel.